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NO. 55800-9-II

IN THE COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON ,

Respondent ,

v.

Xavier Magana

Appellant

Appellant's Opening Brief

DANA RYAN
Attorney for Petitioner
112 W. Meeker
Puyallup, Washington 98371
(253) 273-1159

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A. ASSIGNMENTS OF ERROR

1. The Trial Court failed to enter Findings of Fact to support the the Conclusion of Law, when denying Appellant's Motion to Withdraw Guilty Plea.

2. The Trial Court employed procedures which failed to provide an adequate corrective process when denying Appellant's Motion to Withdraw Guilty Plea.

3. The Trial Court was judicially estopped from denying Appellant's motion without holding a hearing on the merits.

4. The Trial Court applied the incorrect legal standard when denying Appellant's Motion to Withdraw Guilty Plea.

5. The Trial Court erred when denying the appointment of expert' services , for translation of witness statements written in a foreign language.

6. The Trial Court failed to make a determination on the factual voluntariness of Appellant's decision to plead guilty.

7. Counsel's failure to provide translation of witness statements that were written in a foreign language, before advisement to a plea of guilty , renders Appellant's guilty plea involuntary.

8. Counsel's failure to investigate or interview witnesses before advisement to plead guilty, renders Appellant's guilty plea involuntary.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the Trial Court required to enter Findings of Fact to support its Conclusions of Law that : “Based on this Court’s interpretation of the law of the case doctrine, this Court hereby denies the defendant’s motion to withdraw guilty plea. The defendant’s subsequent motions for and evidentiary hearing and for expert services are denied as well.
2. Did the Trial Court provide an adequate corrective process in post conviction proceedings, where Appellant was not present, no Findings of Fact were entered, and the Order was entered off the record in chambers.
3. Was the Trial Court judicially estopped from denying Appellant’s Motion to Withdraw Guilty Plea , based on the Law

The Case Doctrine, where the court previously ordered a hearing on the merits?

4. Did the Trial Court apply the incorrect legal standard when relying on the Law of the Case Doctrine, to avoid a merits determination of a timely filed Motion to Withdraw Guilty Plea?
5. Was the Trial Court required to provide expert services when requested , to provide translation of witness statements written in a foreign language?
6. Was the Trial Court required to make a determination on the voluntariness of Appellant's decision to plead guilty when properly raised in a timely post conviction motion? If so, is Appellant's plea involuntary, where the factual basis for the plea was drastically changed by the State?

7. Was the Appellant's plea involuntarily made where counsel failed to follow Appellant's directive to provide translations of witness statements written in a foreign language.

8. Was Appellants plea involuntarily made where counsel failed to follow Appellant's directive of investigating and interviewing witnesses prior to pleading guilty, and the existence of their testimony undermines the factual basis of the plea and the State's theory of the case?

STATEMENT OF THE CASE

On July 13, 2009 , the Pierce County Prosecuting Attorney charged Xavier Magana with First Degree Murder and Second Degree Unlawful Possession of a Firearm. CP 1-4; RCW 9.32.030(1)(a); RCW 9.41.040(a)_ (i). In April 2010, the Information was amended, adding allegations of aggravating factors as to each offense. CP 8-9. On June 17, 2010, defense counsel filed a Motion for Bill of Particulars. CP 15-16. The State responded , filing State's Motion to Admit ER 404(b) Evidence on August 5, 2010. CP 71-78. In February 2011, the State amended the Information again, dismissing the aggravating factor allegations and the firearm charge in exchange for the Appellant's agreement to plead guilty . CP 130; 2 RP 2.

On April 21, 2010, Appellant presented the Court with a letter, and went on record attempting to fire/terminate defense counsels representation. CP 5-7. 1 RP 3-7. Appellant stated he did not believe

counsel was properly representing him or working in his best interest.

1 RP 4-5. Further asserting that counsel did not allow him to see all of his discovery material , made threats of additional criminal charges, and that counsel did not believe Appellant's factual assertions to the criminal charges. 1 RP 5. Rather, counsel believed Appellant to be guilty . 1 RP 7. Appellant was forced through further proceedings with the same attorney.

Defense counsel prepared a sentencing memorandum in support of the low-end standard range sentence. CP 165-233. Attached to the memorandum was a forensic psychological examination conducted at the request of the defense months prior to the acceptance of the plea agreement to invest a possible mental health defense. CP 189-208.

The evaluation , conducted by Mark Whitehill, Ph.D, a licensed Psychologist, and Richard McLeod, MSW, a licensed independent social worker, involved six hours of direct contact with the Appellant, a battery of psychological tests, and review of the discovery materials. CP 189-208.

The report from the forensic psychological evaluation, prepared on January 21, 2011, detailed the official version of the offense, and Appellant's version; Appellant's family, social, educational background; observations of Appellant's behavior and mental status; and the test results of the psychological exam. CP 189-208. Based on all of this information, the evaluators concluded that Appellant experiences several severe mental health conditions, including post-traumatic stress disorder and severe major depression. While these conditions did not render him legally insane, they did affect his capacity so that he was unable to form the mental intent of premeditation necessary to commit First Degree Murder. CP 198.

Before the Appellant was sentenced on March 25, 2011, he presented to the Court a written statement in which he requested to withdraw his plea of guilty. CP 248-249. 3 RP 3. In the statement, Appellant said he did not believe he was competent to fully understand the proceedings the time he entered the plea of guilty. He told the court

that his father passed away January 5, 2011, and that he had not been able to control his emotions or think clearly. In addition, his sister and mother were talking about leaving the state, and his wife had also told him she was leaving and taking their children. Due to these factors, he did not feel like life mattered, and that contributed to his thought process. Appellant stated that he would not have signed his life away in a plea agreement if he was competent and clear minded. CP 248-249. He also noted that his mental health conditions had not been addressed by medication. CP 248-249.

Appellant further indicated that he believed his attorney was not working towards his best interests and was responsible for persuading him to accept the plea agreement. Appellant felt that he was taken advantage of saying his attorney told him that the plea agreement was his only chance ever to see freedom again, and that when he did not agree to the plea deal immediately, his attorney became angry. Appellant then

reminded the court that when he was presented with a similar plea deal in November 2009, he did not accept it. CP 248-9.

Appellant asked the court to his statement into consideration and allow him to withdraw his guilty plea and undergo a competency evaluation. He also expressed the desire to file a motion alleging ineffective assistance of counsel . CP 248-249. The State responded that it was ready to proceed with the sentencing. It acknowledged, however, that a full hearing on the Appellants Motion to Withdraw his plea may be required. 3 RP 5.

The Court noted that it had reviewed the colloquy from the plea hearing and found Appellant was competent, and that the plea was a knowing, voluntary, and intelligent act. 3 RP 7. The Court did not believe that anything in Appellant's statement demonstrated a manifest injustice. It was more concerned that the victim's family was present and ready to proceed with sentencing. 3 RP 7.

On March 2, 2013, Appellant requested his attorney/client file from former defense counsel John McNeish. CP 699-700. Between April 25, 2013 and June 4, 2013, the Department of Assigned Counsel sent the Appellant the file in two installments. CP 701-703. Appellant discovered an “investigative report” and “NOTE” concerning witness statements written in Spanish, and his formal directive to have these statements translated. CP 705-706. On October 6 , 2013 Appellant requested police reports and handwritten statements in Spanish from the Law Enforcement Support Agency. CP 708-709. On October 26, 2013 LESA responded that the request would cost \$44.70. CP 708-710. On December 12, 2013, Appellant timely filed a Motion the Withdraw Guilty Plea, which received no trial court action, stating “ I have done everything I can to obtain all supporting documentation for my arguments, (failure to translate witnesses), but because of my indigent status, I have been denied access to all records necessary for my defense. CP 329; 264-329.

On August 24, 2020 Appellant petitioned the Washington State Supreme Court for a Writ of Mandamus , to compel the Pierce County Superior Court to act on his Motion to Withdraw Guilty Plea. CP 523-525. On December 2, 2020, the Washington Supreme Court granted the Petition for Mandamus , directing the Pierce Court Superior Court to take action on the motion CP 621.

On November 16, 2020 , Appellant filed : (1) Amended Supplemental Motion to Withdraw Guilty Plea, (2) Motion to Produce Documents, (3) Motion to Take Judicial Notice, Evidentiary Hearing, and to Determine Jurisdiction, (4) Motion for Expert Services . CP 546-557, 561-590. On November 3, 2020, the Trial Court retained jurisdiction of the motions , ordering a hearing on the merits, and directing a response from the State. CP 538-538. The State filed a response December 4, 2020. CP 597-619. Appellant replied on December 14, 2020. CP 625-651. The Trial Court denied relief , without holding a hearing January 6,

2021. CP 686-689. Appellant filed a Motion for Reconsideration January 11, 2021. CP 691-710. The Trial Court denied Appellant's Motion for Reconsideration January 22, 2021. Appellant timely filed this appeal.

C. ARGUMENT

(1) The trial court erred when failing to enter Findings of Fact To support its Conclusions of Law when denying Appellant's Motion to Withdraw Guilty Plea, denying Appellant procedural Due Process.

Issues of constitutional and statutory interpretation are questions of law which are reviewed *de novo*. *Optimer Int'l v. RP Bellevue LLC* 170 Wn. 2d 768 (2011). An appellate court also reviews a trial court's Conclusions of Law *de novo*. *Young v. Toyota Motor Sales, U.S.A.*, 196 Wn. 2d 310 (2020).

The trial court did not enter Findings of Fact when entering the Jan. 6 2021 Order. CP 686-689. "A trial court's oral or memorandum opinion

is no more than an expression of its formal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and the judgment. *State v. Mallory*, 69 Wn. 2d 532 (1966) . Allowing the courts to ignore the written findings requirement would run contrary to the SRA's explicit statutory purpose of "Making the criminal justice system accountable to the public. RCW 9.94A.010; *State v. Friedland*, 182 Wn. 2d 388 (2014). This very unusual posture is on all fours with *State v. Wilks*, 70 Wn. 2d 626 (1967). This court finds itself in the same position as in *State v. Russell*, 68 Wn. 2d 748 (1966), namely that we cannot consider the merits of the appeal because The record contains no findings of fact relating to the issues involved Herein. This appellate review is rendered frivolous, lacking Findings of Fact to support the trial court legal determination.

"Findings of Fact and Conclusions of Law are required by RCW 4.44.050 Rule of Pleadings, Practice and Procedure, providing that in criminal cases

the trial shall be conducted in the same manner as civil actions. *State v. Marchand* 62 Wn. 2d 767 (1967). While the degree of particularity required in the Findings must necessarily be gauged by the case at hand, it should be sufficient to indicate the factual basis for the ultimate conclusion. *State v. Russell, supra*. An appellate court will interpret the absence of a finding as though a finding of fact against the party with the burden of proof. *State v. Armenta*, 134 Wn. 2d 1 (1997). The trial court did not enter Findings of Fact because a fact review was never applied, impeding appellate review CP 686-689.

(2) The trial court failed to provide adequate corrective process, when denying Appellant's Motion to Withdraw Guilty Plea, effectively Denying Appellant Due Process of Law

This court reviews alleged violations of Due Process *de novo* as well as questions of constitutional law . *State v. Ramos*, 187 Wn. 2d 420 (2017).

The issuance of the January 6, 2021 Order, outside of Appellant's presence, without providing Findings of Fact , and a closure of the court resulted in an inadequate corrective process. CP 686-689.

The Due Process Clause of the 14th Amendment mandates an "adequate corrective process. *Carter v. Illinois*, 329 U.S. 173 (1946). " A state must give one whom it deprives of freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface." The concurring opinions in *Case v. Nebraska*, 381 U.S. 335 (1995) suggest that, to be effective, the state postconviction remedy should be sufficiently comprehensive to embrace all federal constitutional claims.

State jurisdiction requirements, limitations of cognizable claims, pleadings rules, briefing restrictions, procedural default doctrines, or other rules or procedures are sufficiently hospitable to the adequate development and litigation of federal constitutional claims. *Case v.*

Nebraska, supra. Appellant is entitled to a hearing on the merits, affording him his constitutional guarantees, and the entering of a constitutionally adequate ruling.

- (3) The Trial Court was Judicially Estopped from denying Appellant's Motion to Withdraw Guilty Plea, without holding a hearing on the merits, after making a judicial determination that it would do so.

The trial court violated mandates of CrR7.8 when denying the Appellant's Motion to Withdraw Guilty Plea , without conducting a hearing on the merits, after making as determination that it would to so. CP 537-538. When a trial court fails to follow a mandatory procedure, it abuses its discretion. *State v. Smit*, 144 Wn. App. 860 (2008) . A trial court acts without authority when it fails to follow the dictates of CrR 7.8. *State v. Mendoza*, 165 WN. 2d 913(2007).

The trial court was judicially estopped from entering the January 6,

2021 Order without holding a hearing on the merits. CP 686-689. The November 3 , 2020 AMENDED ORDER ON DEFENDANTS MOTION TO WITHDRAW GUILTY PLEA stated: IT IS HEREBY ORDERED that this court will retain jurisdiction of the motion....the defendant has made a substantial showing that he or she is entitled to relief....IT IS FURTHER ORDERED that the defendant's motion shall be heard on the merits. CP 537-538. Under the doctrine of Judicial Estoppel, a party is bound by his judicial declarations and may not contradict them in a subsequent proceeding involving the same issues and parties. Blacks Law Dictionary , Abridged Sixth Edition (1991) . A trial court's acceptance of an initial position is a precondition to the application of judicial estoppel. *Taylor v. Bell* , 185 Wn. App. 270, 284 (2014). "There are two primary Purposes Behind the doctrine of judicial estoppel, the preservation of respect for judicial proceedings and the avoidance of inconsistency, waste of time and duplicity. *Afinson v. FedEx Ground Package Systems*, 174 Wn. 2d 851 (2021).

The November 3, 202 Order created a liberty interest, that a specific standard prevails in decision making, when deciding to hear Appellant's motion on the merits. Appellant suffers severe prejudice to the liberty interest in the merits determination which is protected by the Due Process Clause, U.S.C. Amend. V, XIV at which time Appellant was entitled to present his case. CP 537-538.

- (4) The trial court applied the incorrect legal standard when denying Appellant's Motion to Withdraw Guilty Plea, conflicting with constitutional guarantees.

The Law of the Case Doctrine does not bar reconsideration of a previous decision when a different result is compelled by newly discovered evidence, *Weidner v. Thieret*, 932 F. ed 622, 629-630 (7th Cir 1991) or when adherence to the previous decision would work a substantial injustice. *Agostini v. Felton*, 521 U.S. 203, 236 (1997). Analytically resolving mixed questions of law and fact requires establishing relevant facts, determining

the applicable law, and then applying the law to the facts....the process of applying the law to the facts , however is a question of law and is subject to *de novo* review. *Pacific Coast Shredding , LLC v. Port of Vancouver*, 14 Wn. App. 484 (2000). The Law of the Case Doctrine is a mixed Question of law and fact, and arguendo even if the court applied the correct legal standard, the standard was incorrectly applied to the facts of the case. “This court has authority reach any issue necessary to a just disposition. The Law of the Case does not prevent review. *State v. Slerf*, 186 Wn. 2d 869 (2016).

Collateral Estoppel and Res Judicata are equitable doctrines that preclude relitigation of already determined causes. Both doctrines share a common goal of judicial finality and are intended to curtail multiplicity of actions, prevent harassment in the courts, and promote judicial economy. *State v. Dupard*, 93 Wn. 2d 268, 272 (1980). The two doctrines are distinguishable

in scope. Collateral Estoppel, or issue preclusion, bars litigation of particular issues decided in a prior proceeding. Res Judicata, or claims preclusion, bars litigation or claims that were brought or might have been brought in a prior proceeding. The correct standard is a question of law reviewed *de novo*. *Christensen v. Grant County*, 152 Wn. 2d 299 (2004), *Lynn v. Dept. Labor and Industries*, 130 Wn. App. 829 (2005). The trial court erred when it relied on the Law of the Case Doctrine. Res Judicata or issue preclusion was the correct legal standard, had The court entered Findings of Fact and Conclusions of Law in conjunction with a constitutionally sufficient hearing. The failure to rely on either doctrine is now waived.

Res Judicata “ constitutes an absolute bar to a subsequent legal action involving the same claim. The concept of issue preclusion is in substance that any fact, question, or matter in issue and directly adjudicated or necessarily involved in determination of the action before a court of competent jurisdiction in which judgment is rendered on the merits.”

Blacks Law Dictionary, Abridged Sixth Edition (1991).

The Trial Court was precluded from reaching the determination “That the defendant is precluded under the law of the case doctrine from attempting to further argue ineffective assistance of counsel; claims that would have been ruled upon by the Court of Appeals had they been presented by the defendant . CP 686-689. Based upon Res Judicata and Issue Preclusion, the merits of the issues have NEVER been rejected.

The erroneous reliance on the Law of the Case Doctrine, based upon *State v. Bailey*, 35 Wn. App 592 at 594 (1983) (“Questions determined on appeal , or which might have been determined had they been presented, will not again be considered on a subsequent appeal in the same case .” is misplaced. (1) The Motion to Withdraw Guilty Plea was a collateral attack, as opposed to an appeal. CP 561-576, 537-538. The legislature broadly defines collateral attack as “ any form of postconviction relief other than a direct appeal. RCW 10.73.090(2). This includes “ a motion to withdraw guilty plea.” *In re Skylstad*, 160 Wn. 2d 944 (2007). (2) The issues raised could not have been presented in Appellant’s first Direct Appeal, because this documentation was not obtained until after

the Mandate, and the Appellant is a lay person with no formal education in criminal law with which to comprehend the ramifications.

Under Res Judicata, a thing must be judicially acted upon. If those Grounds for relief have never been argued before, let alone acted upon by a merits determination, the Trial Court was precluded from relying on the Law of the Case Doctrine. The Trial Court entered an order retaining jurisdiction and ordering a hearing on the merits , which must be adhered to . CP 537-538.

Black's Law Dictionary's legal definition of the Law of the Case Doctrine determine that, "if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same. This cause was never remanded for further proceedings in regards to the issue presented herein, and the facts most definitely have differed as the Appellant has presented newly discovered evidence (see

the affidavit of Jaquail Roberson) and two witness statements written in Spanish. CP 578-581, 583-587. For Collateral Estoppel to apply, the party against whom the doctrine is asserted must have a full and fair opportunity to litigate its case in a prior proceeding . *Hanson v. City of Snohomish*, 121 Wn. 2d 552, 561 (1993) .

Appellant moves this court to take Judicial Notice, that Appellant made clear in his 2013 Motion to Withdraw Guilty Plea, that due to his indigency he did not have funding to obtain copies of witness statements from LESA, South Sound 911. ER 201 (d). CP 347-351, 708-710. Additionally Appellant Requested his attorney/client file from former defense counsel on March 3, 2013, having received his entire attorney/client file thereafter. CP 699-703. The attorney/client file did not contain these witness statements. Rather, it contained notes sent to defense counsel , requesting translations.CP 705-706. This in turn led Appellant's attempt to obtain these documents. The Mandate In Appellant's first Direct Appeal was issued March 2013. CP 63. It is

therefore illogical to assume Appellant could have presented the claims in the direct appeal . More so, allegations of pro se litigants are held to a less stringent standard than formal pleadings drafted by lawyers.

Appellant urges that these facts must be developed at a reference or evidentiary hearing, on the record, in order to properly provide the Findings of Fact and Conclusions of Law, in conjunction with a ruling which is constitutionally sufficient on the merits. If the facts are still not developed despite the diligence of the defendant at the relevant stages of the proceedings, then the petitioner is not deemed to have failed to develop the facts. *Williams v. Taylor* , 529 U.S. 420 (2000). An evidentiary hearing is required because the trial judge erred in not fully developing the factual record. *Brown v. Farwell*, 525 F. 3d 787, (9th Cir 2008) .

- (5) The Trial Court erred when denying Appellants Motion to for Expert Services, when a certified Translator was required to translate the witness Statements written in a foreign language.

This court reviews alleged violations of due process *de novo*. *State v. Cantu*, 156 Wn. 2d 819 (2006) . The denial of Appellant's request for expert services deprived him of procedural due process and the right to effective assistance of counsel . U.S.C. Amend. Sec V. VI, XIV.

Appellant filed a Motion for Expert Services, which was denied by the trial court on January 6, 2021. CP 555-557. 686-689. Appellant formally requested "expert services", a certified translator, For the purpose of translating the witness statements pertinent to this cause of action written in Spanish. Translation would most certainly aid the parties and the Court in resolution of Defendant's Motion to with Guilty Plea. CP 556; 578-581.

Appellant has a constitutional right to the assistance of an expert as provided in CrR 3.1 . *State v. Hines*, 35 Wn. App. 932 (1983) . A defendant has the right to a competent interpreter. *State v. Pham*, 75

Wn. 2d 1002) . The right to effective assistance of counsel requires that the state pay for indigent services. *State v. Dickamore*, 22 Wn. App. 851 (1979).

It is a manifest injustice that Appellant as an english speaking indigent defendant was unable to comprehend the statements of Spanish speaking witnesses. These statements were crucial to due process and a decision to enter a knowing and voluntary plea. Appellant has refused other plea offers on the record. CP 278. The translation of the statements was necessary to a competent defense, the interview of witnesses, the communication with his attorney, and plea negotiations.

- (6) The Trial Court was required to make a determination of the voluntariness of Appellant's decision to plead guilty where the issue was properly before the court.

This case is reviewed *de novo*. Normally CrR 7.8 motions to withdraw a guilty plea are reviewed for an abuse of discretion. *State v. Hardesty*,

129 Wn. 2d 303 (1996) . However, the request for withdrawal in this case is based on claimed constitutional error and prejudice. *State v. Gresham*, 173 Wn. 2d 404 (2012) . Appellant pled guilty without an understanding of the charges, and correct premeditation theory. To qualify as a knowing and voluntary plea, a guilty plea must be made with a correct understanding of the charge and the consequence of pleading guilty. *State v. Wakefield*, 130 Wn. 2d 464 (1996) . A defendant' misunderstanding is a manifest error affecting a constitutional right. *State v. Mendoza*, 157 Wn. 2d 589 (2006).

Appellant was charged with First Degree Murder based upon the State's Declaration of Probable Cause. CP 1-4. The State altered this theory on the date of August 5, 2010. CP 678-685. The theory was premeditation. The facts alleged were gang retaliation. These are the allegations on which the Appellant pled guilty. CP 388-396. On December 4, 2020, the State changed their theory alleging " The defendant ran up to the fallen victim and fired

additional rounds into Mr. Hendricks premeditated execution. The time it took to create a false pretense to lure the victim outside, pull a gun, shoot him once, run up to him and shoot him some more was “more than a moment in point to time.” CP 604-605. Appellant preserved this issue in his reply, regarding the effect of the State changing their theory. CP 665.

- (7) Counsel’s performance was ineffective when failing to provide translation of witness statements written in a foreign language, before advisement of a plea

Whether an attorney violates the Rules of Professional Conduct is a question of law that is reviewed *de novo*. *State v. Nickels*, 195 Wn. 2d 132 (2020). Because claims of ineffective assistance of counsel are mixed questions of law and fact, they are also reviewed *de novo*. *In Re Fleming*, 142 Wn. 2d 853 (2000).

Appellant was denied effective assistance of counsel by failing to translate the witness statements in Spanish. RPC 1.2(a), 1.3, 1.4(a).

Appellant's plea was not voluntary. CP 572-574. A knowing and voluntary plea was not possible without the Spanish statements known in advance. CP 572. The affidavit of Jaquail Robertson, CP 583-587, the eyewitness statements in Spanish, CP 578-581, also show that the counsel's performance was defective and below accepted standards.

Appellant went on to submit the newly discovered evidence of Jaquail Robertson who was a part of the initial Tacoma Police Department Reports. CP 583-590. This along with the eyewitness statements in Spanish demonstrate that the plea was not voluntary. CP 578-581. The minimal requirements for a valid plea are that an accused must be informed of the requisite elements of the crime charged and an understanding of those elements. *In re Hews, (Hews II)* 108 Wn. 2d 579 (1987).

Appellant bears the burden of showing that (1) counsel's performance fell below and objective standard of reasonableness and (2) that counsel's poor work was prejudicial . *State v. ANJ*, 168 Wn. 2d

91 (2010). Prejudice is established where there is a probability of a difference result but for the errors. *State v. Hendrickson*, 129 Wn. 2d 61 (1995) .

From August 18, 2009 to August 20, 2009 trial counsel sent an investigator to review discovery material . CP 344. Two witness statements were in Spanish. Appellant sent a note to the attorney asking for translation. CP 345. Counsel failed to translate the statements. CP 578-581. Counsel stated no translation was necessary. CP 80-83. Counsel should have known Appellant has a right to an interpreter throughout the proceedings. RCW 2.43.010 . *In re Khan* , 184 Wn. 2d 679. (2015) . This right was not waived by the Appellant, could not be waived by counsel, and represented no legitimate trial strategy.

- (8) Counsel's performance was deficient when failing to perform and inadequate investigation or interview witnesses before advising Appellant to plead guilty.

The court is presented with a claim of ineffective assistance of counsel which resulted in an involuntary guilty plea, a mixed question of law and fact which is reviewed *de novo*. A guilty plea is not voluntary unless the defendant possessed an understanding of the law in relation to the facts. *In re Keene*, 95 Wn. 2d 203 (1981). Appellant has a constitutional right to effective assistance of counsel, including witness interviews. *State v. Ray*, 115 Wn. 2d 531 (1991). It is clear from the record that counsel did interview a single witness prior to advising Appellant to enter a plea of guilty. There can be no strategic reason for this short coming. This case is on point with *State v. Jones*, 183 Wn. 2d 327 (2015) which illustrated that failure to interview witnesses constituted deficient performance. This sort of deficiency caused prejudice, and required reversal.

D. CONCLUSION

This court should remand his case to the Pierce County Superior Court for an evidentiary hearing. The plea in this case was not voluntary. The performance of counsel was deficient.

Dated this 29th day of October 2021.

Respectfully submitted,



DANA RYAN

WSBA # 17418

Attorney for Arthur Emery Jr.

112 W. Meeker

Puyallup, Washington 98371

(253) 273-1159

DANA RYAN

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Appellate Court Case Number: 55800-9
Appellate Court Case Title: State of Washington, Respondent v. Xavier M. Magana, Appellant
Superior Court Case Number: 09-1-03325-2

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IN THE COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON ,

Respondent

v.

No. 55800-9II

XAVIER MAGANA

Appellant

AFFIDAVIT OF SERVICE

TO: CLERK OF THE COURT, DIVISION II

DANA RYAN , UPON OATH, declares:

That on the 30TH day of October 2021 by U.S. Mail, postage prepaid, I served on the Xavier Magana , Appellant, a copy of APPELLANTS OPENING BRIEF by mail, postage paid , to the address of : XAVIER MAGANA #348190, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520.

1
2
3
4
5 I declare under penalty of perjury and under the Laws of the State of Washington that the
6 foregoing is a true and correct statement.

7 Dated 10/30/21

8 
9 _____
10 DANA RYAN
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DANA RYAN

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Transmittal Information

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